No. 95-813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,

Petitioners,

v.

MARVIN PLENERT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION; U.S. SENATOR DIRK KEMPTHORNE: U.S. REPRESENTATIVES BILL BAKER, HELEN CHENOWETH, GERALD B. SOLOMON, AND RICHARD W. POMBO; ALLIED EDUCATIONAL FOUNDATION; AND FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONERS

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national non-profit, public interest law and policy center based in Washington, D.C., which is dedicated to supporting the free

enterprise system and promoting the principles of a limited and accountable government. WLF advances its objectives through litigation and participation in administrative proceedings in both state and federal forums, as well as by publishing educational materials through its Legal Studies Division. WLF has appeared in this Court as well as in other state and federal courts as *amicus curiae*, particularly in environmental cases that raise issues relevant to this case. *See, e.g., Babbitt v. Sweet Home Chapter of Communities*, 115 S.Ct. 2407 (1995); *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992); *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990).

U. S. Senator Dirk Kempthorne of Idaho is the Chairman of the Subcommittee on Drinking Water, Fisheries, and Wildlife of the Senate Committee on Environment and Public Works.

U.S. Representative Bill Baker is a duly elected Member of Congress from the 10th District of California and is also a member of the Subcommittee on Energy and Environment of the House Science Committee.

U.S. Representative Helen Chenoweth is a duly elected Member of Congress from the 1st District of Idaho and is also a member of the Subcommittees on National Parks, Forests, and Lands; Energy and Mineral Resources; and Water and Power Resources, all of the House Committee on Resources.

U.S. Representative Gerald B. Solomon is a duly elected Member of Congress from the 22d District of New York and is Chairman of the House Committee on Rules.

U.S. Representative Richard W. Pombo is a duly elected Member of Congress from the 11th District of California and is a

member of Subcommittees on National Parks, Forests, and Lands and Water and Power Resources of the House Resources Committee; is a member of several subcommittees of the House Agriculture Committee; and is Chairman of the Resources Committee Task Force on Endangered Species.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared before this Court as amicus curiae in numerous cases along with WLF.

The Fairness to Land Owners Committee (FLOC) is a national grassroots private property group headquartered in Cambridge, Maryland. FLOC represents over 18,000 "mom and pop" members who are private property owners faced with confiscatory federal, state, and local land-use laws and regulations involving wetlands, endangered species, growth management, and other concerns.

FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's land. FLOC is active in promoting balanced, fair, and environmentally sensitive legislation that protects property rights. FLOC's public education campaign emphasizes the difference between conservation and confiscation, and its officers and members have testified on numerous occasions before the Congress and state legislatures.

All amici believe that the Ninth Circuit's decision denying standing to petitioners to seek judicial review under the Endangered Species Act was wrongly decided and contrary to the intent of Congress.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of Facts in petitioners' brief. This case involves two reservoirs in the federal government's Klamath Project in Oregon administered by the Bureau of Reclamation. The U.S. Fish and Wildlife Service (FWS) prepared a Biological Opinion recommending maintaining a minimum lake level to protect two species of fish, the effect of which was to designate critical habitat for the fish. The Bureau accepted the FWS recommendation.

Plaintiffs, two Oregon ranch operators and two irrigation districts that use water from the reservoirs, and who are directly affected by the reduced supply of water, filed suit under the citizen suit provision of the ESA, seeking to challenge the FWS Biological Opinion. They alleged that the Biological Opinion was contrary to "scientifically and commercially available evidence" when it concluded that the fish populations in question are declining; in fact, the populations "are reproducing successfully." Complaint ¶ 13, Pet. App. 37.

These plaintiffs sued under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq., the citizen suit provision of the Endangered Species Act (ESA) § 11, 16 U.S.C. § 1540(g)(1), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). The ESA citizen suit provision provides:

> Except as provided in paragraph (2) of this subsection *any person* may commence a civil suit on his own behalf -
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency

> (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g)(1)(emphasis added).

The Ninth Circuit concluded that while the plaintiffs may have standing under Article III of the Constitution, the ESA requires that they demonstrate that they have prudential standing as well, namely, that their interests are within the zone of interests protected or regulated by the ESA. *Bennett v. Plenert*, 63 F.3d 915, 919 (9th Cir. 1995). The Ninth Circuit concluded that under the ESA, only those plaintiffs who allege an interest in the preservation of endangered species fall within the "zone of interests" protected by the ESA. *Id.* Consequently, property owners and others who claim a competing interest to endangered species are without legal recourse under the ESA. *Id.* at 921.[1]

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[1] The court of appeals also rejected the plaintiffs' APA claim for the same reason that it rejected the ESA claim, namely, plaintiffs lack prudential standing. *Id.* at 922. Finally, the court of appeals rejected plaintiffs' NEPA claim under the doctrine of hypothetical jurisdiction, *i.e.*, even if plaintiffs did have standing under NEPA, under Ninth Circuit precedent, no NEPA claim lies for a violation of ESA critical habitat designation. *Id.* While these latter two rulings are not directly before the Court, the resolution of the ESA issue will likely affect how these other issues are to be resolved.

SUMMARY OF ARGUMENT

The court of appeals erroneously concluded that the ESA's citizen suit provision is available only to those persons who seek to preserve species. The plain language of that provision makes it clear, however, that "any person" who otherwise meets the standing requirements under Article III of the Constitution can seek judicial review of governmental action taken under the ESA.

Indeed, only those who have a competing interest in the resources with the species in question, such as petitioners and other property owners, ranchers, farmers, and even medical researchers, can be expected to challenge governmental action taken under the ESA to ensure that that economic and other statutory factors are properly considered in the decisionmaking process as Congress intended. Accordingly, the Ninth Circuit was wrong to require that the plaintiffs meet the zone of interests prudential test.

In any event, petitioners easily satisfy the zone of interests test because they seek to protect their interests which are either protected or regulated by the ESA. Finally, amici submit that petitioners clearly satisfy the basic Article III test for standing. In addition to alleging an injury-in-fact, which is undisputed, that injury can be traced to the respondents' conduct and is likely to be redressed by a favorable judicial decision on the merits.

ARGUMENT

I. CONGRESS INTENDED ESA'S CITIZEN SUIT PROVISION TO AUTHORIZE PERSONS SATISFYING ARTICLE III STANDING REQUIREMENTS TO SEEK JUDICIAL REVIEW WITHOUT REGARD TO THE PRUDENTIAL "ZONE OF INTERESTS" TEST OF STANDING.

There can be no doubt that Congress can, if it wishes, authorize plaintiffs to bring suit in federal court to the fullest extent allowed by the "case or controversy" component of Article III without regard to the prudential limitations on standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 154 (1970). Indeed, as recently as two weeks ago, this Court reaffirmed this well-settled proposition when it stated that "prudential limitations [on Article III standing] are rules of 'judicial self-governance' that 'Congress may remove . . . by statute.'" *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 64 U.S.L.W. 4330, 4334 (U.S. May 13, 1996) (citing *Warth v. Seldin*).[2] Accordingly, the Ninth Circuit was clearly wrong when it held that the prudential zone of interests test of standing was applicable in this case where Congress expressly provided that suit may be brought under the ESA by "any person" who otherwise satisfies Article III standing. 16 U.S.C. § 1540(g)(1).

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[2] The Court held in *United Food* that by enacting a law allowing unions to sue under the Worker Adjustment and Retraining Notification Act, Congress removed a prudential prong of associational standing that otherwise would preclude a labor union from suing to obtain money damages on behalf of its members. *Id.*

The zone of interests test is a judicially imposed prudential limitation on standing that limits the right of judicial review of governmental action to only those litigants whose interests are arguably with the "zone of interests" sought to be protected or regulated by the underlying statute in question. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). This prudential test was adopted by this Court and is employed by other federal courts in those cases where the underlying statute in question does not provide for judicial review.

In enacting the citizen suit provision of the ESA, however, Congress used the broadest and clearest possible language, authorizing "any person" to "commence a civil suit on his own behalf" to "enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to be in violation of" the ESA or any regulation issued under the ESA. 16 U.S.C. § 1540(g)(1). Congress did not qualify this citizen suit provision with any other language limiting the class of persons who may invoke the federal courts.

Indeed, even with regard to legislation such as the Clean Water Act where Congress employed qualifying language that appeared to limit judicial review provisions to citizens "having an interest which is or may be adversely affected," 33 U.S.C. §§ 1365(a), (g), Congress nevertheless expressed its intent that the "adversely affected" language was coterminous with the Article III injury-in-fact element of standing, rather than constituting an additional prudential factor limiting standing.[3] Accordingly, by

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[3] *See* S. Conf. Rept. No. 92-1236 *reprinted in* 1972 U.S.C.C.A.N. 3776 (adopting this Court's definition of "citizen" in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which refers only to the Article III injury-in-fact prong of standing).

enacting the unqualified citizen suit provision of the ESA, Congress *a fortiori* intended to obviate the need of the judiciary to impose any prudential limitation on Article III standing.

The Ninth Circuit, however, ignored the plain language of ESA's citizen suit provision and held that plaintiffs must satisfy additional prudential considerations to seek judicial review of agency action under the ESA under the zone of interests test. 63 F.3d 915, 917. The court of appeals was wrong to place this additional hurdle in the plaintiffs' path both as a matter of law and the policy considerations underlying the standing requirement.

In holding that the zone of interests test was applicable in this case, the court of appeals principally relied upon this Court's decision in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). 63 F.3d. at 917. *Clarke*, according to the court of appeals, was an "exegesis" of this Court's seminal decision establishing the zone of interests test in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970), and its progeny. 63 F.2d at 917. The court of appeals' reliance on these decisions was misplaced.

In both *Data Processing* and *Clarke*, the Court found that the plaintiffs in those respective cases did have standing because they satisfied the prudential zone of interests test. However, the banking statutes under review in both of those cases did *not* have citizen suit or judicial review provisions as does the ESA; rather, standing was predicated upon the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702, which applies to all final agency action.

The judicial review provision of the APA allows for review of agency action by persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). This Court placed its judicial gloss on this APA provision -- "within the meaning of a relevant statute" -- to carry out the intent of Congress by requiring that the interest sought to be protected be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153.

Because Congress made it crystal clear in the citizen suit provision of the ESA that "any person" may bring an action, the Ninth Circuit's analysis of cases, whether APA or non-APA cases, and its psychoanalysis of Congress's intent, was simply an unnecessary exercise. In divining the intent of Congress, this Court has consistently held that the plain meaning of the language employed by Congress controls. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Because there is no ambiguity in the language Congress has chosen, this Court can safely conclude that Congress intended that all litigants who satisfy Article III standing are entitled to seek judicial review of agency action under the ESA.

As a policy matter, denying standing to litigants with "mere" economic interests makes no sense in light of what the standing doctrine is designed to achieve. "Standing" means that a party has a "sufficient stake" in a controversy to ensure that the issues are litigated in a truly adversarial manner rather than by those with only an academic interest. *Sierra Club v. Morton*, 405 U.S. 727, 730-31 (1972). It is hard to deny that landowners who are losing their water or their right to farm their land have a large stake in the controversy; accordingly, they can be expected to vigorously

challenge the lawfulness of governmental action taken under the ESA.

Even the Ninth Circuit recognized that the petitioners assert a "competing interest" in the "very water the government [wrongly] believes is necessary for the preservation of the species." 63 F.2d at 921 (bracketed language added).[4] Under these circumstances, there can be no doubt that "the legal questions presented . . . will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Thus, the very nature of the Article III injury-in-fact alleged in this case itself obviates the necessity of imposing an additional prudential zone of interests test. In any event, as amici will argue *infra*, those economic interests more than satisfy whatever prudential standing requirement that may be deemed applicable.

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[4] The plaintiffs have alleged, as the Ninth Circuit noted, that the fish are "'reproducing successfully' and will not be adversely affected by the long-term operation of the Klamath project." 63 F.2d at 921; Complaint ¶¶ 1, 13, Pet. App. 32, 37. Because this case was decided on a motion to dismiss, these allegations by the plaintiffs must be accepted as true.

II. THE PLAINTIFFS' ECONOMIC AND OTHER INTERESTS EASILY SATISFY THE PRUDENTIAL ZONE OF INTERESTS TEST.

Even if the prudential zone of interests test is applicable, the Ninth Circuit was wrong to conclude that these plaintiffs failed to satisfy that test. A party satisfies the prudential "zone of interest" test if the plaintiff alleges an interest that is "arguably within the zone of interests to be *protected or regulated* by the statute" in question. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396 (1987) (emphasis added). The petitioners here satisfy both prongs of this disjunctive test.

Plaintiffs assert interests which arguably are within the zone of interests to be protected by the ESA. The Ninth Circuit was wrong to conclude that species protection was the only interest the Congress was concerned with. As the petitioners have amply demonstrated in their brief, Congress responded to public criticism of the ESA and amended it over the years by enacting at least four provisions to encompass and protect the interests of petitioners and those similarly situated:

> (1) to require the agencies to "consider the economic impact, and any other relevant impacts" when designating areas for critical habitat (16 U.S.C. § 1533);
>
> (2) to require that Biological Opinions be based on the "best scientific and commercial data available" (16 U.S.C. § 1536(a)(2));
>
> (3) to require that "reasonable and prudent alternatives" to a proposed project that causes jeopardy to a listed species consider economic factors (16 U.S.C. § 1536(b)(3)(A) and pertinent legislative history); and
>
> (4) to require federal agencies "to cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2)).

While not directly applicable in this case, to this list of protected interests can be added the requirement that the federal government "cooperate" and "consult" with the States in carrying out the ESA. 16 U.S.C. § 1535(a).[5]

The Ninth Circuit wore blinders by ignoring this wealth of evidence of Congress's concern for economic and other interests to be considered in the administration of the ESA. Surely, the interests of the petitioners are "arguably within the zone of interests sought to be protected" by the ESA.

Even assuming, *arguendo*, that plaintiffs' interests are not within the zone of interests to be protected, plaintiffs nevertheless satisfy the prudential zone of interests test because the interests they seek to protect are clearly within the zone of interests *regulated* by the ESA. In this and other ESA cases, the listing of endangered species, designation of critical habitat, and other actions taken to preserve species invariably have an economic

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[5] The two irrigation districts which are petitioners in this case are political subdivisions of the State of Oregon, and thus, are not technically covered by the cooperation requirement between the federal agencies and States. Compare 16 U.S.C. § 1532(17) (definition of "State") with 16 U.S.C. § 1532(18) (definition of "State agency").

impact on property owners and those who use water and other natural resources. Property owners and others are regulated by the ESA and its attendant civil and criminal penalties prohibiting the "taking" of endangered species, including the alteration of habitat. 16 U.S.C. §§ 1538, 1540.

In the case at bar, the actions of the government have a direct impact on the amount of water resources available to the plaintiffs for irrigation and other uses. The Biological Opinion regulates the water level in the reservoirs by requiring that they be maintained at a certain level. As a direct consequence, the amount of water available to the plaintiffs which they otherwise would be entitled to receive pursuant to the irrigation district's contracts with the United States for water supplies is thereby reduced. Plaintiffs are not simply "arguably within the zone of interests sought to be regulated," they are undeniably placed right in the middle of that zone.

The Ninth Circuit simply ignored how the ESA in this case regulates the plaintiffs, and instead adopted a narrow and crabbed view of the zone of interests test that allows standing for only those who seek to protect endangered species. The court of appeals relied solely on several of its decisions in the environmental area, such as the Clean Water Act and the National Environmental Policy Act, without seriously applying this Court's jurisprudence on the subject. 63 F.2d at 919-22.

If the Ninth Circuit's narrow approach to standing is adopted, then a whole host of environmental statutes will be off limits to property owners, businesses, and others directly regulated by these

laws from seeking judicial review of agency decisions.[6] The Ninth Circuit's approach should be soundly rejected; instead, amici submit that the approach taken by the Tenth Circuit in *Catron County v. U.S. Fish & Wildlife*, 75 F.3d 1429 (10th Cir. 1996) should be adopted.[7]

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[6] *See* Emergency Planning and Community Right-to-Know Act of 1986 § 326, 42 U.S.C. § 11046(a); Clean Air Act § 304(a), 42 U.S.C. § 7604(a); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(a); Deepwater Port Act of 1974 § 16, 33 U.S.C. § 1515(a); Clean Water Act § 505, 33 U.S.C. § 1365 (any "citizen," defined as "person or persons having an interest" *etc.*); Resource Conservation and Recovery Act § 7002, 42 U.S. § 6972; Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8; Toxic Substances Control Act § 20, 15 U.S.C. § 2619; Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g). The Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 provides review by "any person having a valid legal interest which is or may be adversely affected"; and the Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270, says much the same.

[7] In *Catron*, the Tenth Circuit found standing to review an ESA decision under NEPA, and held that ESA does not displace NEPA's requirements. More importantly, a regulated entity was found to have standing under NEPA which does not even have an express provision for judicial review. Consequently, the adoption of the approach taken by the Tenth Circuit would necessarily permit judicial review by petitioners under the ESA, which contains a clear citizen suit provision, as well as permit petitioners (and others similarly situated) to litigate their NEPA claim as well.

III. THE NINTH CIRCUIT'S CATEGORICAL RULE THAT ONLY THOSE WHO ALLEGE AN INTEREST IN SPECIES PRESERVATION HAVE PRUDENTIAL STANDING WOULD FOSTER IRRATIONAL AND UNREVIEWABLE DECISIONMAKING UNDER THE ESA, CONTRARY TO THE INTENT OF CONGRESS.

The Ninth Circuit held that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." 63 F.2d at 919 (emphasis in original). This limitation on the class of plaintiffs who may seek judicial review under the ESA would frustrate the intent of Congress to ensure that agencies engage in a rational decisionmaking process under the ESA by considering economic and other factors.

As the Ninth Circuit itself recognized:

> [W]e are aware that the ESA specifically provides that the government should consider a variety of factors -- *including economic ones* -- in designating critical habitat for species. See 16 U.S.C. § 1533(b)(3). * * * We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than *ensure* a *rational decisionmaking process* by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. * * * To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to

> further species protection [rationally] into the means to frustrate that very goal. * * * Accordingly, we hold that the plaintiffs have no standing under the ESA.

63 F.3d at 921-22 (emphasis and brackets added).

Amici submit that allowing standing to petitioners in this case and to those whose economic interests are similarly affected would not "frustrate" the very goal of the ESA as the Ninth Circuit feared; on the contrary, it would further that goal. That goal, as even the Ninth Circuit characterized it, is to "ensure a rational decisionmaking process." *Id.* at 921. The only way to "ensure" that the government agency and employees consider the economic and other factors is to have available judicial remedies, including injunctive relief. Certainly, those plaintiffs whose only interest is the protection of the species at all costs would not be expected to "ensure a rational decisionmaking process" by requiring the agency to consider economic and other similar factors.

Congress made the unremarkable political decision in enacting and amending the ESA that such species protection proceed in a rational manner. If agencies are free to escape judicial review of their decisions so long as they take action only in favor of protecting a species, whatever the countervailing costs and science, irrational decisionmaking based on junk science will continue to flourish, and congressional intent frustrated.

The following hypotheticals -- all of which have a factual basis -- amply illustrate how the Ninth Circuit's decision would foreclose judicial review of arbitrary and irrational agency action taken under the ESA that otherwise would cause Article III injury to individuals and property owners who do not allege an interest in species protection. Indeed, this Court's recent decision in

Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (1995), was brought by a group of property owners and logging companies who asserted economic interests rather than any interests in preserving endangered species. If the Ninth Circuit is correct, then this Court lacked jurisdiction to decide the *Babbitt* case.

Incidental take permits. Suppose the Fish and Wildlife Service (FWS) concludes that a company's barge operations on a branch of the Mississippi River affect an endangered freshwater snail. FWS says it will issue an incidental take permit under ESA § 10(a), but only on condition that the permittee donate $100,000 to the FWS fisheries lab in Bay St. Louis, Mississippi. If the company refuses to pay, it has no standing to challenge the denial of the permit under the Ninth Circuit's categorical rule because the plaintiff's motive is not species protection.

Critical habitat. FWS lists as endangered a bird known as the bluegray gnatcatcher, based on information that the public is not allowed to see. As a result, billions of dollars' worth of coastal foothill land in California is suddenly undevelopable. *Cf. Laguna Greenbelt, Inc. v. United States DOT*, 42 F.3d 517 (9th Cir. 1994). Under the decision below, no county, affected city, builder, landowner, or any scientist has standing to challenge the listing, unless the motivation is to preserve the species (which, according to some biologists, is not a "species" at all).

Critical habitat designation. FWS decides that an endangered prairie mole cricket lives only on 10 parcels of land in Oklahoma; nine are owned by state and federal agencies and one owned by a farmer. FWS decides that only the farmer's parcel should be listed as critical habitat because FWS does not want to interfere with the activities of the state and federal agencies on the

public lands. The farmer has no standing to challenge the decision.

Medical research. A scientist applies for a permit to take an endangered fish because the scientific community thinks a compound in its blood may hold a clue to preventing Alzheimer's disease. The scientist does not need to kill the fish; he intends only to draw a milliliter of blood, which is done routinely to other species of sucker in the same genus without harming the fish. FWS refuses to issue the permit. The scientist, whose interest is human health rather than the welfare of the fish, has no standing.

Scientific permits. A scientist wants to place tiny bands on the feet of Newell's shearwaters, a threatened species of birds. Scientists handle the young shearwaters each autumn on Kauai, Hawaii, when they are found dazed on the roads on their first journey from the mountains to the sea after being attracted by street lamps. Because the scientists handle the birds when they are collected to be released at sea, they are required to apply for a take permit. FWS nevertheless says that the applicant for the permit will not be allowed to do his study. Banding a known number of birds and later observing the percentage of birds that is banded is the only feasible way to estimate the size of the population. The study may show that the species has fully recovered and should no longer be listed as threatened. But under *Bennett*, the scientific community has no standing to challenge the FWS; the threatened species will thus continue in perpetuity to be listed as such even though it is fully recovered and no longer entitled to that status.

Delisting decisions. The scientific community has argued for a decade that the California brown pelican has fully recovered and should be removed from the endangered species list. Although the

Secretary of the Interior is required by ESA section 4(c)(2) to remove such species from the list every five years, the Secretary has elected to devote his resources to adding more species to the list. Southern California fishermen who are affected by the erroneous listing of the brown pelican have no standing.

Hardship Permits. A widow's net worth is invested in a parcel of land in Michigan that contains a pond containing the endangered Hungerford's crawling water beetle. The widow wishes to develop the parcel in a manner that might affect the existence of the pond and requests a hardship permit from FWS under ESA § 10(b). FWS refuses to issue the permit. The widow has no standing and risks a $50,000 criminal fine and a year in prison if she develops her land.

* * * * *

The government may argue that landowners or scientists have standing if they are denied a permit or are regulated by a permit, and especially if they are assessed a penalty. But why are these hypotheticals distinguishable from the instant case? Not because the zone of interest test should come out differently under the Ninth's Circuit categorical rule in *Bennett*, for the interests of the hypothetical farmers, landowners, and scientists are no more the preservation of wildlife than they are in *Bennett*.

If there is a distinction, then it must be either that the effect of the statute on the *Bennett* plaintiffs was not direct enough (which goes to the "imminent injury" element) or that allowing judicial review would not be likely to remedy the harm (which goes to "redressability"). We address these issues below. For now, it is enough to say that the plaintiffs do not lack standing by

virtue of the zone of interests test relied on by the court of appeals.

IV. PLAINTIFFS MEET THE "CAUSATION" AND "REDRESSABILITY" REQUIREMENTS OF ARTICLE III STANDING.

The government argued for the first time in this Court that even though petitioners suffered an injury-in-fact, they failed to satisfy the other two prongs of Article III standing, namely, that their injury can be traced to the issuance of the flawed Biological Opinion, and that their injury is likely to be redressed by a favorable ruling voiding that decision. See U.S. Opp. Cert. at 9-13.

This argument is spurious. It works only if one assumes, contrary to the evidence of this very case, that the FWS's opinion has little influence on its sister agencies. And yet it can hardly be denied that changing the Biological Opinion would likely change the outcome of the case and the impact on plaintiffs' water rights. In any event, a court should not indulge a presumption that agencies will not at least seriously consider biological opinions that federal law directs them to consider.

"[A] party seeking judicial relief need not show to a certainty that a favorable decision will redress his injury. A mere likelihood will do . . . . [A] plaintiff need not 'negate every speculative and hypothetical possibilit(y) . . . in order to demonstrate the likely effectiveness of judicial relief.'" *National Wildlife Federation v. Hodel*, 839 F.2d 694, 705-06 (D.C. Cir. 1988).

In this case, the FWS recommended that minimum water levels be maintained and a sister agency accepted it. Furthermore, the plaintiffs have alleged in their Complaint that the Bureau of

Reclamation "will abide by the restrictions imposed by the Biological Opinion." Pet. App. 32. Because this case was decided on a motion to dismiss, all allegations of fact, including this one, must be regarded as true. Accordingly, the plaintiffs have satisfied both the "causation" and "redressablity" prongs of Article III standing.

Even if it is determined that petitioners failed to allege facts sufficient to demonstrate causation and redressability, nevertheless, it would appear that they have established "procedural standing" as described in *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2142. In *Lujan*, this Court suggested that plaintiffs could seek to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.* . . . the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." *Id.* In further explaining this notion of procedural standing, this Court further noted that:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability and immediacy*. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

112 S. Ct. at 2142-43, n.7 (emphasis supplied).

In the instant case, the plaintiffs also alleged a violation of the procedural requirements of NEPA when the agency failed to prepare an environmental assessment prior to determining critical habitat for the fish in question. Whether or not the Biological Opinion constitutes an "implicit" rather than formal designation of critical habitat, the issue is whether or not the opinion constitutes a "major federal action" under NEPA; if it does, then the NEPA requirements are triggered. 42 U.S.C. § 4332(C)(2).

But even if the United States is correct in stating "[t]hat there is no such thing as an 'implicit' designation of critical habitat under the ESA" and that only formal designations are subject to ESA's procedures, U.S. Opp. Cert. at 12, n.6, plaintiffs' allegations can be fairly construed to mean that critical habitat has been designated *de facto*, and that the formal procedures required by the ESA for establishing critical habitat (*e.g.*, notice and comment) have not been followed. If those statutory procedures had been followed, then the economic and other factors would have been required to be considered by the agency. In short, the agency did indirectly what it could not do directly or formally, namely, designate critical habitat without considering economic and other relevant factors. In that regard, the plaintiffs have procedural rights under the ESA, and satisfy procedural standing under footnote 7 of *Lujan*.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. "Any person" who meets the Article III standing requirements should be able to bring a citizen suit under the Endangered Species Act.

Respectfully submitted,

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